MOTION FILED

DEC 9 1998

No. 98-5864

In The Supreme Court of the United States

OCTOBER TERM 1998

TOMMY DAVID STRICKLER,

Petitioner,

v.

FRED W. GREENE, WARDEN,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS, VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS, VIRGINIA TRIAL LAWYERS ASSOCIATION, AND VIRGINIA CAPITAL CASE CLEARINGHOUSE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

Gerald T. Zerkin, #16270
GERALD T. ZERKIN & ASSOCIATES
530 East Main Street, Suite 800
Richmond, Virginia 23219
(804) 788-4412

Counsel for Amici Curiae

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

38 pp

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

The National Association of Criminal Defense Attorneys (NACDL), the Virginia College of Criminal Defense Attorneys (VCCDA, the Virginia Trial Lawyers Association (VTLA) and the Virginia Capital Case Clearninghouse, a Special Project of Washington & Lee University School of Law (VCCC), by counsel, respectfully request leave, pursuant to Rule 37.3.(b) of this Court, to file this Brief as Amici Curiae in support of the Petitioner in the above-styled action. The Petitioner has consented to the filing of the Brief and the Respondent has withheld consent. The letter from counsel for Petitioner has been filed with the Court.

NACDL is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice.

VCCDA is recognized by NACDL as its Virginia state affiliate. VCCDA is a statewide, non-profit organization of approximately 416 criminal defense practitioners. Its purpose is to enhance the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the framework of Virginia practice. To that end, it conducts continuing legal education seminars for criminal defense practitioners to improve the quality of their representation. In addition, it provides direct services to its members when they face important issues implicating the

fundamental fairness of the criminal justice system, including litigation advice and support, research and the filing of amicus briefs.

VTLA is non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia. Founded in 1960, VTLA works to enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice. VTLA includes among its interest sections a Criminal Law Section. Its members regularly participate in trials in state and federal courts. As an association of trial lawyers dedicated to preserving the rights of individual litigants in civil and criminal trials, VTLA believes it is well situated to recognize issues of importance to trial lawyers and their clients and to assist the Court.

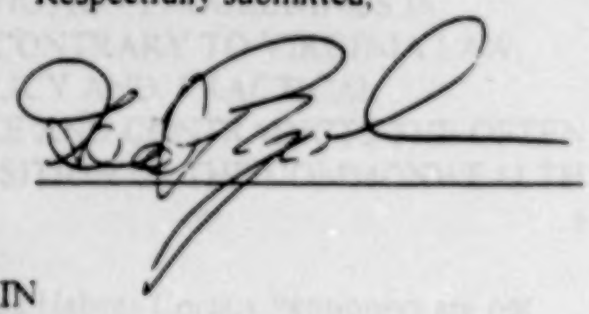
Members of NACDL, VCCDA and VTLA are regularly appointed by the courts of the Commonwealth and the United States to represent capital and other defendants, and to represent inmates in habeas corpus proceedings.

VCCC is a clinical program of Washington and Lee University School of Law. Its competitively selected students and tenured faculty director pursue a single paramount goal: making the right to effective assistance of counsel meaningful in Virginia capital cases. It has existed since 1988, assisting defense counsel at all stages of litigation in hundreds of cases. That experience has provided an excellent vantage point from which to assess the issues now before this Court.

Amici recognize that the non-disclosure of material exculpatory evidence by the State is a major impediment to meaningful adversarial testing of the prosecution's case in Virginia. The creative employment of procedural bars, such as the one at issue in this case, to avoid remedying non-disclosure exacerbates the problem of such non-disclosure and contributes to the sporting nature of life and death litigation. In addition, the Fourth Circuit's interpretation and application of the so-called "due diligence" exception to the constitutional duty of the State to disclose exculpatory evidence eviscerates that constitutional right in the Commonwealth. Being committed to the constitutional rights of all criminal defendants and to the need for defendants to be able to vindicate those rights in both the courts of the Commonwealth and the United States, *Amici* believe that the decision in this case must be overturned.

No counsel for any party to this case authored the proposed brief in whole or in part, and no person or entity other than NACDL, VCCDA, VTLA or VCCC and their members, made any monetary contributions to its preparation or submission. *See* Rule 37.6.

Respectfully submitted,



GERALD T. ZERKIN
Counsel of Record
530 E. Main Street, Suite 800
Richmond, VA 23219
(804) 788-4412
Attorney for Amici Curiae

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS

VIRGINIA TRIAL LAWYERS ASSOCIATION

VIRGINIA CAPITAL CASE CLEARINGHOUSE

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES **PAGE**

RULES **PAGE**

ATTORNEY GENERAL OPINIONS **PAGE**

INTEREST OF *AMICI CURIAE*

The National Association of Criminal Defense Attorneys (NACDL), the Virginia College of Criminal Defense Attorneys (VCCDA), the Virginia Trial Lawyers Association (VTLA), and the Virginia Capital Case Clearinghouse, a Special Project of Washington & Lee University School of Law (VCCC), file this joint brief in support of the petitioner. *See*, Rule 37.3(a) Counsel for petitioner has consented to the filing of this brief. Counsel for respondent has refused to consent to the filing of this Brief.[1]

NACDL is a non-profit corporation with a membership of more than 10,000 attorneys and 28,000 affiliate members in 50 states. The American Bar Association recognizes NACDL as an affiliate organization and awards it full representation in its House of Delegates. NACDL was founded in 1958 to promote study and research in the field of criminal law, to disseminate and advance knowledge of the law in the area of criminal practice, and to encourage the integrity, independence, and expertise of defense lawyers in criminal cases. NACDL seeks to defend individual liberties guaranteed by the Bill of Rights and has a keen interest in ensuring that legal proceedings are handled in a proper and fair manner. Among NACDL's objectives are to promote the proper administration of justice.

VCCDA is recognized by NACDL as its Virginia state affiliate. VCCDA is a statewide, non-profit organization of approximately 416 criminal defense practitioners. Its purpose

---

[1] No counsel for any party to this case authored this brief in whole or in part, and no person or entity other than NACDL, VCCDA, VTLA or VCCC and their members, made any monetary contributions to its preparation or submission. *See* Rule 37.6.

is to enhance the quality of criminal justice in the Commonwealth of Virginia and to advance the same general goals of NACDL within the framework of Virginia practice. To that end, it conducts continuing legal education seminars for criminal defense practitioners to improve the quality of their representation. In addition, it provides direct services to its members when they face important issues implicating the fundamental fairness of the criminal justice system, including litigation advice and support, research and the filing of amicus briefs.

VTLA is non-profit professional organization of approximately 2,800 trial lawyers throughout the Commonwealth of Virginia. Founded in 1960, VTLA works to enhance the professionalism and skills of trial lawyers and to promote the fair and effective administration of justice. VTLA includes among its interest sections a Criminal Law Section. Its members regularly participate in trials in state and federal courts. As an association of trial lawyers dedicated to preserving the rights of individual litigants in civil and criminal trials, VTLA believes it is well situated to recognize issues of importance to trial lawyers and their clients and to assist the Court.

Members of NACDL, VCCDA and VTLA are regularly appointed by the courts of the Commonwealth and the United States to represent capital and other defendants, and to represent inmates in habeas corpus proceedings.

VCCC is a clinical program of Washington and Lee University School of Law. Its competitively selected students and tenured faculty director pursue a single paramount goal: making the right to effective assistance of counsel meaningful

in Virginia capital cases.[2] It has existed since 1988, assisting defense counsel at all stages of litigation in hundreds of cases. That experience has provided an excellent vantage point from which to assess the issues now before this Court.

Amici recognize that the non-disclosure of material exculpatory evidence by the State is a major impediment to meaningful adversarial testing of the prosecution's case in Virginia. The creative employment of procedural bars, such as the one at issue in this case, to avoid remedying non-disclosure exacerbates the problem of such non-disclosure and contributes to the sporting nature of life and death litigation. In addition, the Fourth Circuit's interpretation and application of the so-called "due diligence" exception to the constitutional duty of the State to disclose exculpatory evidence eviscerates that constitutional right in the Commonwealth. Being committed to the constitutional rights of all criminal defendants and to the need for defendants to be able to vindicate those rights in both the courts of the Commonwealth and the United States, *Amici* believe that the decision in this case must be overturned.

The brief of *Amici* does not address every point argued by the parties. For example, Amici do not address the arguments of the parties as to the materiality of the suppressed evidence. *Amici* concentrate instead on two issues which may

---

[2] The program statement of purpose reads: "The Virginia Capital Case Clearinghouse is not about theoretical or philosophical support for or opposition to the death penalty. Rather, it is about commitment to the principle that one who stands to forfeit his life is entitled to the effective assistance of counsel, both for his sake and for the sake of those who would take that life."

assist the Court -- Virginia law, public policy and practice related to discovery in criminal and post-conviction cases and the Fourth Circuit's interpretation and application of its "due diligence" exception to the duty to disclose exculpatory evidence.[3]

SUMMARY OF ARGUMENT

The Fourth Circuit predicated its finding that Petitioner had defaulted his Brady claim on a theory never advanced by Respondent -- indeed, on a theory that is entirely inconsistent with Virginia law, public policy and practice. Contrary to the assumption of the Court of Appeals, the investigatory files of the prosecution and law enforcement agents are not subject to discovery during habeas corpus proceedings in Virginia. In post-conviction, discovery is narrower, not broader, than at trial, and, at trial, such information is not discoverable. Indeed, such information is *privileged* in Virginia, as the Virginia Attorney General has opined in formal opinions and has successfully argued in numerous capital post-conviction cases. Moreover, in the context of claims of non-disclosure of exculpatory evidence, declarations by prosecutors that no exculpatory evidence exists, or that all such evidence has been disclosed, are *final*, whether at trial or thereafter, and preclude discovery, absent detailed factual allegations in the petition as to the evidence not disclosed. In short, discovery is not available in Virginia to enable a habeas corpus petitioner to investigate potential claims, regardless of the suspicions of

---

3 *Amici* adopt the Petitioner's Statement of Facts. Copies of the unpublished court records referred to in this Brief have been collected by counsel for *Amici* and will be provided upon request to the Court or parties.

counsel, but only, under extremely limited circumstances, to facilitate proof of a claim *after* an evidentiary hearing has been granted.

In addition to being wrong regarding Virginia post-conviction practice, the Fourth Circuit has been dangerously wrong about the Brady doctrine. In its recent decisions on the subject, the Fourth Circuit has developed a unique interpretation of the so-called "due diligence" exception to the duty of the State to disclose exculpatory evidence. While two Courts of Appeals have refused to recognize such an exception and two others have limited it to the prevention of "blatant gamesmanship" by defense counsel, the remaining Courts of Appeals have applied the exception only where the evidence at issue was readily available to the defense. On the other hand, the Fourth Circuit has applied the exception whenever the Court can hypothesize a means by which the defense *could have* discovered the evidence itself, regardless of its actual. Consequently, the exception has swallowed the rule in the Fourth Circuit, eliminating any incentive for prosecutors to disclose such evidence.

ARGUMENT

The Fourth Circuit's judgment was erroneous on two grounds which *Amici* address here: (1) its conclusion that exculpatory information in the files of the prosecutor and law enforcement agents is subject to discovery is entirely inconsistent with Virginia law, public policy and practice, and (2) its unique interpretation of the so-called "due diligence" exception to the constitutional requirement that exculpatory evidence known to the prosecution be disclosed, threatens the continuing vitality of the duty to disclose. For these reasons, the decision must be reversed.

I. THE COURT OF APPEALS' ASSUMPTION THAT THE FILES OF PROSECUTORS AND LAW ENFORCEMENT AGENCIES IN VIRGINIA ARE READILY SUBJECT TO DISCOVERY IN STATE POST-CONVICTION PROCEEDINGS IS DIRECTLY CONTRARY TO VIRGINIA LAW, PUBLIC POLICY AND PRACTICAL EXPERIENCE AND CONTRADICTS THE OFTEN STATED POSITION OF THE COMMONWEALTH ITSELF

In finding that Petitioner was procedurally barred from pursuing his due process claim under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny, the Court of Appeals fashioned from whole cloth the notion that habeas corpus petitioners in Virginia are entitled to broad discovery, even as to claims for which the petitioner does not yet have evidentiary support. Indeed, before the Court of Appeals reached that conclusion, Respondent had never even suggested that Strickler would have been entitled in state court to subpoena the police file.

Under these circumstances, no habeas petitioner in Virginia could have obtained police files through discovery. At trial, the Commonwealth had represented that it had made *all* its evidence available to the defense through an "open file." In response to an ineffective assistance of counsel claim in the state habeas proceedings, the State denied the existence of any undisclosed exculpatory evidence, attesting that it had provided all the Commonwealth's exculpatory evidence through the prosecution's "open file."

A. Virginia Habeas Corpus Petitioners are not Afforded Discovery to Investigate Possible Claims

The suggestion by the Court of Appeals that a Virginia habeas corpus petitioner who does not already know the factual basis of his claim can simply subpoena the contents of the police file is fanciful at best. First, a claim lacking factual details would be summarily dismissed as a conclusory pleading, even if the petitioner has no way to know the facts in the possession of the Commonwealth's agents. *See* Fitzgerald v. Bass, 6 Va.App. 38, 44, 366 S.E.2d 615, 618 (1988)(en banc) (*citing*, Penn v. Smyth, 188 Va. 367, 370-1, 49 S.E.2d 600, 601 (1948), *cert. denied*, Fitzgerald v. Thompson, 493 U.S. 945 (1989).

Moreover, even if summary dismissal could be avoided, discovery in habeas cases is extremely limited. The applicable rule of court provides that discovery is allowed only "with leave of the court" and that the court "may deny or limit discovery...." Va. Sup. Ct. Rule 4:1(b)(5). A showing of "good cause" is a prerequisite to obtaining discovery. *See* Rakes v. Fulcher, 210 Va. 542, 547, 172 S.E.2d 751, 756 (1970) (holding that discovery is available only upon demonstration of substantial need for the material). Thus, claim can not survive summary dismissal, and the petitioner can not obtain discovery, unless he can at least set forth the details of the exculpatory information that exists and is sought. White v. Commonwealth, 12 Va.App. 99, 102, 402 S.E.2d 692, 694 (1991).[4]

While White involved a motion made at the trial level rather than in post-conviction, discovery is more restrictive in habeas corpus, not less, as the Commonwealth has consistently argued.

B. Under Virginia Law, The Work Product of Attorneys for the Commonwealth and Their Agents is Privileged. Its Disclosure Would Violate Virginia's Strong Public Policy and the Respondent's Consistent Position is that It is not Discoverable.

Where, as here, the information sought is the work product of the attorney for the Commonwealth or law enforcement agents, Virginia courts are particularly vigilant in limiting the petitioner's access. *See, e.g.*, Rosser v. Commonwealth, 24 Va. App. 308, 316, 482 S.E.2d 83, 87 (1997) (initial report of investigating officer not discoverable)(*citing*, Ramirez v. Commonwealth, 20 Va.App. 292, 296-7, 456 S.E.2d 551, 553 (1995)) and Va. Sup. Ct. Rule 3A:11(b)(2)); *see also* Va. Sup. Ct. Rule 4:1(b)(3)(work product of attorney's agents not discoverable absent showing of substantial need)

E.g., Warden's Opposition to Motion for Leave to Invoke Discovery in Goins v. Netherland, Record No. 962477 (Va.S.Ct. 1997)(Petitioner not entitled to more discovery than at criminal trial) App. 3; Director's Opposition to . . . Motion for Order to Release Files and Motions for Discovery in M.D. Williams v. Angelone, Record No. 970491 (Va.S.Ct. 1997) ("...Williams is not entitled to most of the requested items because he was not entitled to them even when he was a criminal defendant in a criminal proceeding. *See* Rule 3A:11; Strickler v. Commonwealth, [241 Va. 482], 404 S.E.2d 227, 233, [] *cert. denied* 502 U.S. 944 (1991)"); Opposition to Petitioner's Motion for Discovery in Yeatts v. Murray (Cir.Ct. Pittsylvania Co. 1993) (". . .because Yeatts was not entitled to such information at his criminal trial, there is no basis for discovery of this information in collateral proceedings").

Indeed, at every judicial and legislative turn, Virginia has opted for the non-disclosure of the work product of the prosecutorial team. The General Assembly has maintained the privilege for such documents by exempting all criminal investigatory material from the disclosure requirements of Virginia's Freedom of Information Act, *even after the conclusion of the prosecution.*[5] Va. Code § 2.1-342(b)(1). *See*, 1980-81 Va. Op. Atty. Gen. 141, 1981 WL 141051 at *3 (Va.A.G.) For its part, "the Supreme Court of Virginia [has] reaffirmed the *confidentiality* of police investigative reports ...." Id., 1981 WL 141051 at *3 (emphasis added). Consequently, the Attorney General has concluded "that it would be *contrary to public policy* and the sound administration of justice for any court routinely to order the prosecution in criminal cases to turn over its files to defense attorneys." Id. (Emphasis added). Similarly, the Attorney General has concluded that, because of the strong public policy against disclosure, it is the province of the prosecutor, not the police officer, to determine whether the officer's notes should be disclosed to the defense. 1997 WL 174144 (Va. A.G.) That policy is so strong that, in one habeas case, Fisher v. Murray, CL-89006620-00 (Cir. Ct. Bedford Co.) the Attorney General sought to have the petitioner sanctioned for even requesting police files under FOIA.

Not surprisingly, the Attorney General has consistently

---

[5] As recently as 1996, the Virginia General Assembly rejected an attempt to amend this provision of the FOIA by allowing for the release of such material following the conclusion of the trial and direct appeal in a criminal case. House Bill 974. *See*, http://legis.state.va.us/cgi-bin/legp.504

argued that such documents are privileged [6] And, under the Rules of Court, *privileged documents are exempt from discovery in state habeas proceedings*. Va. Sup. Ct. Rule 4:1(b)(5).

---

[6] *See, e.g.*, Respondent's Response to Motion to Conduct Discovery in King v. Murray, No. CL93000211 (Cir.Ct. Roanoke Co. 1993) ("The requested materials, including the Commonwealth's files and records and the files and records of the named law enforcement officers are privileged matters, not discoverable by the petitioner."); Respondent's Objection to Petitioner's Motion for Leave to File a Request for the Issuance of a Subpoena Duces Tecum...in T. Williams v. Thompson, No. LP 88-81 (Cir.Ct. City of Danville 1989) ("When one considers the legislative intent expressed in the Freedom of Information Act, the Supreme Court of Virginia's intent expressed in the criminal rules, and the case law from across the country, reasons compels the conclusion that the criminal investigative files of the Commonwealth, fall within the meaning of the word "privileged" as used in Rule 4:1(b)(5)"); Respondent's Memorandum in Opposition to Petitioner's Motion for Leave to Conduct Discovery from the Commonwealth in Correll v. Thompson, No. 87-04-1787 (Cir.Ct. Franklin Co. 1987). ("It would be a bizarre result indeed to hold that a criminal defendant, whose freedom hangs in the balance, is precluded under Rule 3A:14 from obtaining criminal investigative files, but the policy reasons underlying the rule somehow dissipate to allow the same individual to gain access to the same files by filing a civil habeas corpus action. The Supreme Court of Virginia, in promulgating the rules, never intended such an anomalous result"); Response to Petitioner's Motion for Leave to Conduct Discovery in Beaver v. Thompson, No. 88-13 (Cir.Ct. Prince George Co. 1988)(same).

Consistent with that public policy, and contrary to the federal rule, *see*, Jencks v. United States, 353 U.S. 657 (1957), among others, Virginia has also refused to require prosecutors to make the statements of its witnesses available to the defense even *after* they have testified. Bellfield v. Commonwealth, 215 Va. 303, 306-7, 208 S.E.2d 771, 774 (1974), *cert. denied*, 420 U.S. 963 (1975). In so holding, the Virginia Supreme Court concluded that the rule of Jencks would be inconsistent with "the same policy of fundamental fairness in protecting the ability of the Commonwealth to prosecute, which we recognized in our earlier cases and led to the adoption of [Va. Sup. Ct.] Rule 3A:14...." Bellfield, 215 Va. at 307, 208 S.E.2d at 774. *See also* Abdell v. Commonwealth, 173 Va. 458, 472, 2 S.E.2d 293, 298-99 (1939) (a rule allowing pretrial disclosure of the Commonwealth's evidence would "tend to subject the attorney for the Commonwealth to great annoyance, lead to the probable destruction or loss of material evidence.... Such a rule...would ...subvert the whole system of criminal law").[7] Indeed, it does not even require disclosure of the names of the Commonwealth's witnesses prior to their taking the stand. *See, e.g.*, Watkins v. Commonwealth, 229 Va. 469, 479, 331 S.E.2d 422, 430-31 (1985), *cert. denied*, 475 U.S. 1099 (1986).

---

[7] Nor is the privilege for investigatory information limited to criminal litigation. *See*, 1980-81 Va. Op. Atty. Gen. 141, 1981 WL 141051 at *2 (noting that, in In re: Comm. of Va. Dept. Of State Police, Record No. 781249 (Va. Sup. Ct. 1978), the Court, at the behest of the Attorney General, issued a writ of prohibition barring a trial court from enforcing its order in a civil case directing the State Police to disclose the results of its related investigation).

Not only the law, but also the lesson of practical experience in Virginia belies the theory of discovery asserted by the Court of Appeals. For example, since exclusive original jurisdiction over capital habeas corpus cases was vested in the Virginia Supreme Court in 1995, *see*, Va. Code § 8.01-654(c)(1), that court has denied discovery in each of the twelve cases in which it has been requested.[8]

It is hardly surprising, therefore, that the theory advanced by the Court of Appeals was not advanced by Respondent himself. The Commonwealth, represented by the Attorney General, has consistently and successfully argued that, where the petitioner has not already alleged sufficient facts to state a constitutional claim, he is not entitled to discovery to enable him to investigate potential claims, no matter how suspicious of prosecutorial misconduct he may be.[9] Consequently, in each of

---

[8] The last grant of discovery was in 1992, in Payne v. Thompson, (Cir.Ct. Powhatan Co. 1990).

[9] *See, e.g.*, Respondent's Response to Motion to Conduct Discovery in King v. Murray, No. CL93000211 (Cir.Ct. Roanoke Co. 1993) ("Petitioner's speculations are insufficient basis for discovery of the prosecutor and police files"); Warden's Opposition to Motion for Leave to Invoke Discovery in Goins v. Netherland, Record No. 962477 (Va.S.Ct. 1997)(Petitioner not entitled to discovery because Brady claims are "speculative" and petitioner cannot show he is entitled to relief based on his petition); Opposition to Petitioner's Request for Subpoena Duces Tecum in Stewart v. Angelone, Record No. 952042 (Va.S.Ct. 1996)(Petitioner not entitled to his own medical records from pre-trial incarceration as he has failed to produce evidence in habeas petition showing he was not

the habeas corpus cases in which discovery of any kind has been granted, an evidentiary hearing had already been ordered.[10] *See, also*, Rakes, 210 Va. at 546, 172 S.E.2d at 755 ("The mere assertion ... that discovery is necessary for a movant to investigate fully and prepare his case is clearly insufficient as a statement of good cause...").

Counsel's suspicions that exculpatory evidence exists simply do not legally suffice in Virginia to justify discovery of the work product of the prosecutor or law enforcement agents. *See*, Rakes, 210 Va. at 517, 172 S.E.2d at 756; Hughes v.

---

competent at the time of trial); Respondent's argument on petitioner's discovery motions in Mueller v. Murray, No. CL94-HC-550 (Cir.Ct. Chesterfield Co. 1995)("The petitioner seems to suggest that, well, I need to have discovery and I need to have a plenary hearing and we will see if there is any validity to my claims. This is putting the cart before the horse. The pleadings, based on the record [,] case law, et cetera have to be cognizable in and of themselves — you normally don't have discovery [in habeas cases]."

[10] *See*, Fitzgerald v. Bass, (Cir.Ct. Chesterfield Co. 1984); Fisher v. Murray, CL-89006620-00 (Cir. Ct. Bedford Co.); O'Dell v. Thompson, CL89-1475 (Cir.Ct. City of Virginia Beach 1990); T. Williams v. Thompson, No. LP 88-81 (Cir.Ct. City of Danville 1989); Payne v. Thompson, (Cir.Ct. Powhatan Co. 1990); Pruett v. Thompson, CL87-2070 (Cir.Ct. City of Virginia Beach 1988); Evans v. Mitchell, No. 7371 (Cir.Ct. City of Alexandria 1986); Jones v. Blair, No. L-3652 (Cir.Ct. York Co. 1985); Clark v. Morris, No. 50768 (Cir.Ct. Fairfax Co. 1982).

Commonwealth. 18 Va.App. 510, 526, 446 S.E.2d 451, 461 (1994)(en banc); Ramdass v. Commonwealth, 246 Va. 413, 420-21, 437 S.E.2d 566, 570-71 (1993), *rev'd. on other grounds*, 512 U.S. 1217 (1994). *See also* Howard v. Warden, 232 Va. 16, 17, 348 S.E.2d 211, 212 (1986) (noting circuit court decision that police files are privileged and not open for examination even when state habeas petition alleges Brady violation and petitioner moves for discovery). Thus, Strickler, who did not know the facts necessary to plead a specific Brady claim, could not have obtained discovery of undisclosed police files.

Finally, there is no support for the suggestion that a habeas petitioner in Virginia can obtain access to police investigatory files by making an informal "request" for exculpatory evidence during the state habeas proceedings. The Commonwealth simply does not recognize the existence of a continuing post-trial duty to disclose exculpatory evidence. *E.g.*, Director's Opposition to Renewed Motion for Expert Services, Motion to Amend, Motions for Order to Release Files, and Motion for Discovery in M.D. Williams v. Angelone, Record No. 970491 (Va.Sup.Ct. 1997) ("The "exculpatory evidence" cases which govern a prosecutor's production of information in a criminal trial simply do not apply to a post-conviction proceeding in which the Department of Corrections is the defendant/respondent"); Opposition to Petitioner's Motion for Disclosure of Exculpatory Evidence and Discovery in Cardwell v. Angelone, Record No. 951539 (Va.Sup.Ct. 1995) ("Cardwell has cited no authority for extending the rule in Brady to habeas proceedings and respondent has found none"); Response in Opposition to Motion for Disclosure of Favorable Evidence and Statements, Motion for Extension of Time and Motion for Leave to File Amended Petition in Royal v. Netherland, Record No. 960620 (Va.Sup.Ct. 1996) ("The affirmative obligations imposed upon the Commonwealth under Brady simply do not apply to the

post-conviction civil proceeding"). No Virginia court has held otherwise and the petitioners' motions for exculpatory evidence in Cardwell, Royal and Williams were denied by the Virginia Supreme Court.[11]

In the face of an affirmative denial by the Commonwealth as to the existence of exculpatory evidence, no discovery is available. *See*, Lowe v. Commonwealth, 218 Va. 670, 679, 239 S.E.2d 112, 118 (1977) (defendant not entitled to discovery absent clear showing that state failed to comply with the trial court's general order to turn over any exculpatory material), *cert. denied*, 435 U.S. 930 (1978). As *this* Court has noted, "'[u]nless defense counsel becomes aware that other exculpatory evidence was withheld and brings it to the court's attention, the prosecutor's decision on disclosure is final.'" Pennsylvania v. Richie, 480 U.S. 39, 59 (1987). *Also*, 1997 WL 174144 at *2 (Va.A.G.). As a consequence, Virginia does not even require counsel to demand exculpatory evidence after the Commonwealth Attorney has advised the defense that none exists. *See*, Fitzgerald, 6 Va.App. at 48, 366 S.E.2d at 620-21.

In short, discovery in Virginia is not available to a habeas

---

[11] In Cardwell v. Angelone, Record No. 951539 (Va. Sup. Ct. 1995), the accomplice witnesses testified they received no promises or benefits, yet two of them were not prosecuted at all. The most important accomplice witness suggested in his confession that he *had been* promised a benefit for cooperating and he ultimately did enter into a highly beneficial plea agreement. Nevertheless, discovery of exculpatory evidence as to these witnesses was denied and the claim was dismissed. *See*, Motion for Disclosure of Exculpatory Evidence and for Discovery; Order.

petitioner for the purpose of investigating and identifying possible claims. Rather, discovery is available, if at all, only to aid in the proof of claims which have already been pled with sufficient factual specificity to demonstrate the petitioner's entitlement to relief if those facts are proven at an evidentiary hearing. That is all the more true where the evidence which the petitioner seeks would be contained in the files of the prosecutor or the police, especially if the Commonwealth states that all its evidence was disclosed to the defense. The suggestion of the Court of Appeals, therefore, that Strickler could have subpoenaed the police files, when he lacked sufficient information to plead his Brady-related claim fully, and in the face of both the Commonwealth's asserted "open file" at trial and its denials as to the existence of exculpatory evidence during post-conviction proceedings, is entirely inconsistent with Virginia law, public policy and practical experience, and with the often stated position of the Attorney General, on behalf of the Commonwealth.

II. THE FOURTH CIRCUIT'S UNIQUE INTERPRETATION OF BRADY V. MARYLAND AND ITS PROGENY HAS CAUSED ITS "DUE DILIGENCE" EXCEPTION TO SWALLOW THE RULE THAT THE PROSECUTION MUST DISCLOSE EXCULPATORY EVIDENCE.

For the State to violate Brady, it must *suppress* evidence. *See*, Brady, 373 U.S. at 86-90. Absent suppression, there is no violation. Some courts, however, have additionally created a so-called "due diligence" exception to the Brady doctrine, relieving the State of its disclosure obligations where the evidence is otherwise available to the defense.

Only the Court of Appeals for the Fourth Circuit has adopted and applied an interpretation of the so-called "due

diligence" exception to the State's duty to disclose exculpatory evidence which shifts to the defense the burden to discover for itself exculpatory evidence solely in the possession of the State. Some other Courts of Appeals have recognized the exception, but have applied it only where the evidence was actually known by, or was fully available to, the defense, or where the defense actually had all the information needed to produce the evidence itself. *See, e.g.*, Lugo v. Munox, 682 F.2d 7, 9-10 (1st Cir. 1982); United States v. Payne, 63 F.3d 1200, 1208-09 (2nd Cir. 1995); United States v. Perdomo, 929 F.2d 967, 973 (3rd. Cir. 1991); Westley v. Johnson, 83 F.3d 714, 725-26 (5th Cir. 1996); United States v. Todd, 920 F.2d 399, 405 (6th Cir. 1990); United States v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996); United States v. Davis, 785 F.2d 610, 618 (8th Cir. 1986); United States v. Brown, 562 F.2d 1144, 1151 (9th Cir. 1977); United States v. Valera, 845 F.2d 923, 927-28 (11th Cir. 1988).[12] Indeed, prior

---

12 However, two Courts of Appeals, the D.C. and Tenth Circuits, have explicitly rejected the idea of any such "exception." *See*, Banks v. Reynolds, 54 F.3d 1508, 1517 (10th Cir. 1995); United States v. Agurs, 510 F.2d 1249, 1253 (D.C. Cir. 1975)(*citing*, Levin v. Katzenbach, 363 F.2d 287, 291 (D.C. Cir. 1966)), *rev'd on other grds*, 427 U.S. 97 (1976), and two others have conceded the logic of the position of those two Circuits, while adopting a highly restrictive rule of "diligence" to avoid blatant "gamesmanship" by defendants. *See*, United States v. Hedgeman, 564 F.2d 763, 768 (7th Cir. 1977); United States v. Shelton, 588 F.2d 1242, 1250 (9th Cir. 1978). *See also* United States v. White, 970 F.2d 328, 337 (7th Cir. 1992)(no duty of disclosure when information is "fully available" to the defense). Thus, in reality, there is little difference in the positions of these two Circuits and those of the D.C. and Tenth Circuits, since, based upon the resulting lack of

to its decision in Hoke v. Netherland, 92 F.3d 1350 (4th Cir.), *cert. denied*, 117 S.Ct. 630 (1996), the Fourth Circuit similarly limited application of this exception. *See, e.g.*, United States v. Kelly, 35 F.3d 929, 933-37 (4th Cir. 1994)(finding violation based, *inter alia*, upon failure to disclose information contained in affidavit which had been placed in court file after start of trial even though Government had alerted defense to relevant areas of inquiry and even provided leads for successful pursuit of information); Barnes v. Thompson, 58 F.3d 971, 975-77 (1995)(holding defense counsel responsible for knowing evidence adduced at the trial of a co-defendant).

As the Fourth Circuit rule has evolved in Hoke and now Strickler,[13] however, the State is excused from disclosing exculpatory evidence if the Court, in retrospect, can hypothesize some means by which the defense could have uncovered the information itself. In the view of the Fourth Circuit, the exception applies whether or not the defense knew the evidence or witnesses existed, what efforts it did make to uncover the evidence, what difficulties the police themselves encountered in discovering the information, or even whether the information was located in places to which the defense had no access. Thus, in Hoke, the Court found no duty to disclose where counsel attempted to uncover the information, but was met with hostility

---

materiality, the Tenth Circuit has also held that no constitutional violation occurs where the defense actually has the evidence. *Compare*, Banks, 54 F.3d at 1517 *with* Davis, 785 F.2d at 618 and Brown, 562 F.2d at 1151.

[13] Strickler v. Pruett, 149 F.3d 1170, 1998 WL 340420 (4th Cir. 1998).

and threats, where he did not uncover relevant witnesses, and where the police themselves had difficulty coaxing the truth from the victim's "erstwhile bedmates." 92 F.3d at 1369 (Hall, J., dissenting). Hoke, of course, was followed by the instant case, in which the Fourth Circuit concluded, *sua sponte*, and in direct conflict with the law of Virginia, that privileged information in the possession of the police, the existence of which the Commonwealth had denied, could simply have been subpoenaed during the state habeas proceedings. See, Strickler, 1998 WL 340420 at *8.

The Fourth Circuit has, thus, entirely shifted the burden from the State (to disclose exculpatory evidence) to the defense (to find that evidence itself), regardless of whether the defense actually could have done so. If this does not formally abolish the Brady doctrine, a mere three years after this Court reaffirmed it in Kyles v. Whitley, 115 S.Ct. 1555 (1995), it wounds it fatally. Indeed, it eliminates *any* practical incentive for a prosecutor to disclose evidence which may be harmful to the State's case. A defendant who does manage to discover the evidence himself will have no complaint. However, an aggrieved defendant who does not discover the evidence, once convicted, must not only find the evidence that was suppressed at his trial and demonstrate its materiality, he must also preclude any and all scenarios by which he theoretically could have discovered the evidence himself prior to trial, a burden constrained only by the limits of the Court of Appeals' imagination.

CONCLUSION

For the foregoing reasons, the decision of the Court of Appeals for the Fourth Circuit should be reversed.

Respectfully submitted.

GERALD T. ZERKIN
Counsel of Record
530 E. Main Street, Suite 800
Richmond, VA 23219
(804) 788-4412
Attorney for Amici Curiae

NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS

VIRGINIA COLLEGE OF CRIMINAL DEFENSE ATTORNEYS

VIRGINIA TRIAL LAWYERS ASSOCIATION

VIRGINIA CAPITAL CASE CLEARINGHOUSE

APPENDIX

TABLE OF CONTENTS

Va.S.Ct. Rule 3A:11:

VIRGINIA SUPREME COURT RULE 3A:11. DISCOVERY AND INSPECTION

(a) Application of Rule. This Rule applies only to prosecution for a felony in a circuit court.

(b) Discovery by the Accused.

(1) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused, or copies thereof, or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports and written reports of a physical or mental examination of the accused or the alleged victim made in connection with the particular case, or copies thereof, that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.

(2) Upon written motion of an accused a court shall order the Commonwealth's attorney to permit the accused to inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth, upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. This subparagraph does not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case, except as provided in clause (ii) of subparagraph (b)(1) of this Rule.

...

Va.S.Ct. Rule 4:1(b)(5):

VIRGINIA SUPREME COURT RULE 4:1
GENERAL PROVISIONS GOVERNING DISCOVERY

•••

(b) **Scope of Discovery.** Unless otherwise limited by order of the court in accordance with these Rules, the scope of discovery is as follows:

•••

(5) *Limitations on Discovery in Certain Proceedings.* In any proceeding (1) for separate maintenance, divorce or annulment of marriage, (2) for the exercise of the right of eminent domain, or (3) for a writ of habeas corpus in the nature of coram nobis: (a) the scope of discovery shall extend only to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus or in the nature of coram nobis without prior leave of court, which may deny or limit discovery in any such proceeding. In any proceeding for divorce or annulment of marriage, a notice to take depositions must be served in the Commonwealth by an officer authorized to serve the same, except that, in cases where such suits have been commenced and an appearance has been made on behalf of the defendant by counsel, notices to take depositions may be served in accordance with Rule 1:12.

•••

Va. Code Ann. § 2.1-342(B)(1)(Supp. 1998):

VIRGINIA FREEDOM OF INFORMATION ACT

Section 2.1-342. Official records to be open to inspection; procedure for requesting records and responding to request; charges; exceptions to application of chapter. -- A. Except as otherwise specifically provided by law, all official records shall be open to inspection and copying by any citizens of the Commonwealth during the regular office hours of the custodian of such records. Access to such records shall not be denied to citizens of the Commonwealth, representatives of newspapers and magazines with circulation in the Commonwealth, and representatives of radio and television stations broadcasting in or into the Commonwealth. The custodian of such records shall take all necessary precautions for their preservation and safekeeping. Any public body covered under the provisions of the is chapter shall make an initial response to citizens requesting records open to inspections within five work days after the receipt of the request by the public body which is the custodian of the requested records. Such citizen requests shall designate the requested records with reasonable specificity. A specific reference to the is chapter by the requesting citizen in his request shall not be necessary to invoke the provisions of this chapter and the time limits for response by the public body. The response by the public body within such five work days shall be one the following responses:

1. The requested records shall be provided to the requesting citizen.

2. If the public body determines that an exemption applies to all of the requested records, it may refuse to release such records and provide to the requesting citizens a written explanations as to why the records are not available with the explanations making g specific reference to the applicable Code sections which make the requested records exempt.

3. I f the public body determines that an exemption applies to a portion of the requested records, it may delete or excise that portion of the records to which an exemption applies,

but shall disclose the remainder of the requested records and provide to the requesting citizen a written explanations as to why these portions of the record are not available to the requesting citizen with the explanation making specific reference to the applicable Code sections which make that portion of the requested records exempt. Any reasonably segregatable portion of an official record shall be provided to any person requesting the record after the deletion of the exempt portion.

4. If the public body determines that it is practically impossible to proved the requested records or to determine whether thy are available within the five-work-day period, the public body shall so inform the requesting citizen and shall have an additional seven work days in which to provide one of the three preceding responses.

•••

B. The following records are excluded from the provisions of this chapter but may be disclosed by the custodian in his discretion, except where such disclosure is prohibited by law:

1. Memoranda, correspondence, evidence and complaints related to criminal investigations; adult arrestee photographs when necessary to avoid jeopardizing an investigation in felony cases until such time as the release of such photograph will no longer jeopardize the investigation; reports submitted to the state and local police, to investigators authorized pursuant to § 53.1-16 and to the campus police departments of public institutions of higher educations as established by Chapter 17 (§ 23-232 et seq.) of Title 23 in confidence; portions of records of local government crime commissions that would identify individuals providing information about crimes or criminal activities under a promise of anonymity; records of local police departments relating to neighborhood watch programs that include the names, addresses, and operating schedules of individual participants in the program that are provided to such departments under a promise of confidentiality; and all records of persons imprisoned in penal institutions in the Commonwealth provided such records relate to the imprisonment. Information in the custody of law-enforcement officials relative to

the identity of any individual other than a juvenile who is arrested and charged, and the status of the charge or arrest, shall not be excluded for the provisions of this chapter.

Criminal incident information relating to felony offenses shall not be excluded from the provisions of the chapter; however, where the release of criminal incident information is likely to jeopardize an ongoing criminal investigation or the safety of an individual, cause a suspect to flee or evade detection, or result in the destruction of evidence, such information may be withheld until the above-referenced damage is no longer likely to occur from release of the information.

•••